



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 02 230 53810 Office: VERMONT SERVICE CENTER Date: \_\_\_\_\_

IN RE: Petitioner:  
Beneficiary:

[Redacted]

Aug 1 6 2004

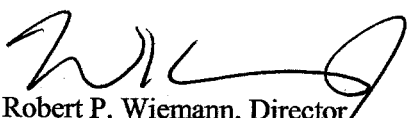
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy

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**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be a branch of [REDACTED] located in Egypt, and states that it is a food and restaurant business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for an additional period of three years at a salary of \$30,000 per year. The director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner stated that the beneficiary's job duties would include "executive decision making for all aspects of business, management of employees: hiring & training of staff, liaison with customers, marketing development, establishment of corporate goals, policies & procedures."

On August 2, 2002, the director issued a request for additional evidence. The director's request included such documents as the petitioner's organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision; a more detailed description of the beneficiary's job duties; a percentage breakdown of time spent performing each duty; and a quarterly wage report for all of the petitioner's employees for the first quarter of 2002.

The petitioner's response included the following list of the beneficiary's proposed duties:

1. Executive Decision making in all aspects of company affairs and policies;
2. Managing and overseeing company affairs, including employees, sales, and communications with clients;
3. Supervising the establishment of contacts and market products with manufacturers, suppliers, dealers, and clients;
4. Supervising the research of new and upcoming markets to enter, to give the company the cutting edge on particular products, and directing and guiding the staff and consultants necessary for such projects;
5. Meeting with and recruiting clientele[;]
6. On completion of a project, meeting with the client and acquiring his or her satisfaction; follow-up with order up-dates;

7. Training employees to provide high quality and efficient service to clientele;
8. Overseeing the screening and hiring and firing for all potential consultants and employees; overseeing account management and payroll;
9. Leading company meetings to provide product and efficiency updates, targets, goals, and sales projection estimates for employees and clientele.

Although requested by the director, the petitioner failed to provide a percentage breakdown of time spent performing each duty. Nor did the petitioner provide a block organizational chart showing its structural hierarchy and staffing levels. Instead, the petitioner stated that all of its employees report directly to the beneficiary. The petitioner also claimed that the restaurant employs a treasurer, who mainly performs accounting and bookkeeping functions and has an associate degree in business; a clerk, who "run[s] business;" and three cooks who also deal in assisting the restaurant's patrons.

On December 17, 2002, the director denied the petition noting that the petitioner failed to submit relevant tax information to confirm how many employees the petitioner has and whether they are employed on a full-time or part-time basis. The director concluded that the petitioner failed to establish that the beneficiary would primarily perform duties of a qualifying nature.

On appeal, counsel repeated a previously given description of the beneficiary's duties, focusing primarily on the beneficiary's discretionary authority and decision-making powers. While such authority is essential in establishing visa classification as a manager or executive, it is only one of several factors considered in making this determination. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As such, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). This is done in an effort to determine whether the beneficiary primarily performs managerial or executive duties. In the instant case, the beneficiary's duties include meeting with restaurant patrons and overseeing staff that cannot be deemed professional or managerial. While it is foreseeable that at least some of the beneficiary's duties would be of a non-qualifying nature, the petitioner's failure to include percentage breakdowns for the listed duties precludes the AAO from being able to ascertain that the beneficiary *primarily* performs qualifying duties. Although the petitioner indicates that the beneficiary's duties include executive decision-making, managing company affairs, and supervising the establishment of contacts, this terminology is too broad to convey an understanding of what the beneficiary actually does on a daily basis. Furthermore, the fact that the beneficiary meets with clientele and elicits their feedback, in the context of a restaurant business, suggests that the beneficiary is essentially a first-line supervisor who oversees cooks and wait staff rather than an executive or manager who manages an essential function, or a staff of professional, managerial, or supervisory personnel.

On review, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the

business and supervising non-managerial and non-professional personnel. While counsel disputes the director's consideration of the petitioner's personnel size without considering its reasonable needs, the AAO notes that the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). In the instant case, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. As such, the petitioner does not appear to have a reasonable need to employ someone in a primarily managerial or executive capacity. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that there is a qualifying relationship between the U.S. and foreign entities. The petitioner claims that the U.S. entity is a branch of the foreign entity. However, the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if it is owned in any part by a foreign corporation. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. It is noted that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds discussed in this paragraph, this petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.